Changes in Japanese Copyright Law Post-1990s : US/Corporate Interest vs. User Demand

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Abstract

After the era of the "Lost 20 Years," a qualitative change occurred in Japanese popular culture. That change was the arrival of User-Generated Content (UGC, meaning works created by general users who are not professionals and provided for free via the Internet) as amusement for young people. Among UGC, however, there are many works that have been created and distributed without any regard for copyright, and the gap has widened between the state of popular culture and the legal system.

After the 1990s, the Japanese Copyright Act became stricter as the number of cases that were violations under the law increased; amendments were introduced year after year that primarily served the intentions of copyright holders. This paper reviews what kind of power the content industry and the US government exerted on the amendment of the Japanese Copyright Act and discusses the possible effects on Japanese popular culture as a result of potential future legal amendments that are possibly realized with the Trans-Pacific Partnership (TPP).

1. Introduction

Copyright laws[1] are deeply related to the state of cultural activity in a country. While they contribute to the development of culture by protecting the rights of works, when those protections are too restrictive, the convenience of the utilization of works is lost. In keeping with the changes of the times, searching for a balance has become a critical legal viewpoint.

If we think about the phenomenon after 1991, when the bubble economy ended, marking the end of the Lost 20 Years, we can see that period wherein a qualitative

1 The Japanese Copyright Act is a civil law modeled on German law, and it differs from the system of common law. A major difference between the U.S. Copyright Act and the Japanese Copyright Act is that in the latter, the content of individual rights and restrictions are precisely stipulated in provisions, there is no legal principle of fair use, and there is the concept of an offense subject to prosecution only on complaint that cannot be brought before the court without a complaint from the copyright holder.

change occurred in Japanese popular culture. That change was, namely the emergence of a large number of "prosumers" who, while receiving digital content, produced/transmitted that content, with high performance/networked personal computers and software of all types, marked by the groundbreaking release of Windows 95 in 1995. The works that they created have been called User-Generated Content (UGC). UGC, being provided for free via the Internet, became mainstream, and enjoying such free content was established as amusement for young people. The emergence of an income disparity that brought about a hesitation with regard to expenditures for paid amusements formed the background of such enjoyment. However, since an analysis of the socioeconomics of the Lost 20 Years deviates from the purpose of the present study, this paper does not touch upon it here.

Some examples of UGC can be reproductions or derivative works of manga or anime released on video-sharing sites such as pixiv, "*kusokora*" meaning a parody collage work; "MAD videos" of remixed existing videos/musical works; "tried to sing/tried to dance," where people sing popular songs themselves or make dance videos to fit the songs; works that use the vocaloid social phenomenon Hatsune Miku, and others. Since these are some areas where problems with rights have been resolved, there is no reason to think that they all have problems with copyright. However, many users who create UGC produce and release works without regard for copyrights, and there is a strong reaction among them with respect to things that make laws stricter and limit users.

On the other hand, based on a sense of legal compliance that is at times excessive, people who find products that are suspected to be an infringement of rights and denounce them in depth on the Internet have also appeared. It can be said that one of the main causes that psychologically supports such people is the trend of the strengthening of copyright protections.

This paper examines the changes to the Japanese Copyright Act, assesses the demands from the U.S. and the lobbying of the cultural industry that worked toward those changes, as well as the responses to those activities primarily from Internet users, and discusses the area of the TPP copyright that is presumed to have an effect on the directionality of Japanese culture hereafter.

2 . Complication/Toughening of the Copyright Act

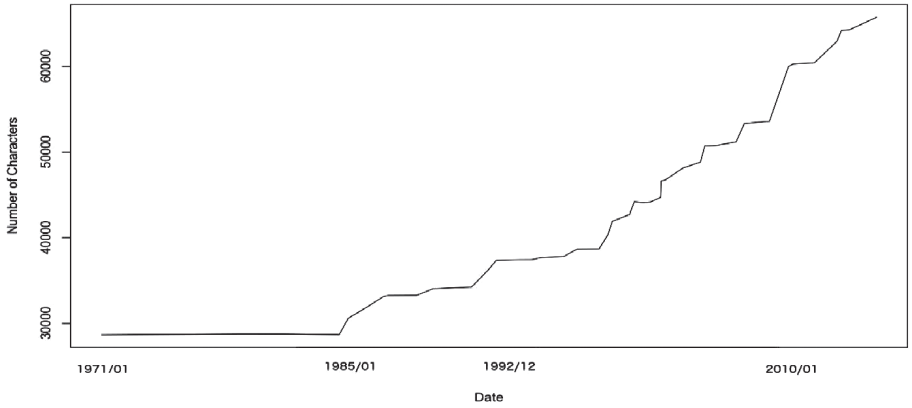

Fig. 1 Changes in the total character count of the Copyright Act (round numbers)

First, let us obtain an overview of the changes to the Japanese Copyright Act. Fig. 1 is a graph of the total character count of the current Copyright Act in round numbers, from the enactment of the law in 1971 till date. The total character count increased about 2. 3 times over this 44-year period, and about 1. 9 times when compared with 1991, when the Lost 20 Years began. Above all, the increase after 1992 has been steep, and the amendment of the Copyright Act has largely been performed like an "annual event." Among the principle Japanese laws, there are no other examples of amendments being frequently repeated to this degree.

In most cases, the content of the amendments consider the side of the copyright holder, such as the addition of matters that are illegal and the strengthening of penalties. Amendments for the sake of the convenience of users of literary works have thus been extremely limited to things such as provisions for the sake of information access for physically disabled persons or deregulation limited to the National Diet Library.

Concerning the law becoming stricter, in 1971, when the current Copyright Act was enacted, the penalty for an individual violator was "imprisonment up to three years, or a fine up to 300, 000 JPY," and for a corporation, it was "a fine up to 300, 000 JPY." In 1985, the fine for both individuals and corporations was up to 1, 000, 000 JPY, and in 1997, it rose to 3, 000, 000 JPY. In 2001, the fine for a corporation changed to 100, 000, 000 JPY, and in 2005, the penalty for an individual became "subject to imprisonment up to five years, or a fine up to 5, 000, 000 JPY, or both." In the same year, the fine for a corporation was raised to 150, 000, 000 JPY. Then, in 2007, the law acquired the current provisions of "subject to imprisonment for a term of up to ten years, a fine

of up to ten million yen, or both" for an individual, and "a fine of up to three hundred million yen" for a corporation.[2]

The provision of the Copyright Act that has become the most complicated can be identified in the provision of Article 30 that established Reproduction for Private Use. In the initial Copyright Act of 1971, the provision of Article 30 was very simple, as follows:

> Article 30　A user may reproduce a work that is subject to copyright (hereinafter in this Subsection referred to as a "work") if the reproduction is for personal or family use or for any other use of a similarly limited scope.

This provision of Article 30 restricts copyright in order to ensure the convenience of users for the utilization of works, and it is exceedingly important text from the viewpoint of attempting to balance the protection and utilization of works. However, in 1985, 1993, 1999, 2010, and 2012, Article 30 was amended in a form where text was added, and the convenience of the user got largely narrowed gradually. As shown below, the current Article 30 has become so exceedingly complex that it can hardly be grasped in summary if one is not a specialist in copyright.

> Article 30　(1) Except in the following cases, a user may reproduce a work that is subject to copyright (hereinafter in this Subsection referred to as a "work") if the reproduction is for personal or family use or for any other use of a similarly limited scope (hereinafter referred to as "private use"):
>
> (i) a user reproduces a work by means of an automated duplicator (meaning a device with a function for making reproductions, of which all or most of the instruments for making the reproductions are automated) that has been set up for use by the public;
>
> (ii) the reproduction of the work has become possible due to the circumvention of technological protection measures (meaning that the removal or alteration (excluding removal or alteration due to technological constraints accompanying the conversion of recording or transmission systems) of the signals that the technological protection measures use, makes it possible to take an action that the technological protection measures prevent or makes it so that a barrier no longer arises as a result of an action that the technological protection measures deter;

2　For details, please refer to chapter 1 of Yamada Shōji, *Nihon no chosakuken wa naze konnani kibishiinoka* (Kyoto: Jimbun Shoin, 2011).

the same applies in Article 120－2, items (i) and (ii)) or a barrier to reproduction of the work no longer arises as a result of that circumvention, and the user reproduces the work in the knowledge of this fact;

(iii) the work is received via an automatic public transmission that infringes a copyright (including an automatic public transmission that is transmitted abroad and that would constitute a copyright infringement if it were transmitted in Japan), and the user records the sounds or visuals of the work in digital format, in the knowledge of this fact.

(2) A person who, for private use, records the sound or visuals of a work in a digital format, on a digital sound or visual recording medium that is provided for by Cabinet Order, by means of a machine with digital sound or visual recording functions (excluding a machine with special performance capabilities for use in the broadcasting business or other special performance capabilities that are generally not offered for private use, and also excluding a telephone with a sound recording function or any other machine with sound or visual recording functions incidental to its primary function) which is provided for by Cabinet Order shall pay a reasonable amount of compensation to the copyright owner.

3. The Legal Amendment Procedure and the ARR

As expressed symbolically in the provisions becoming stricter or the changes to Article 30, the amendments to the Copyright Act have been conducted in a form that largely satisfies the demands of the cultural industry. However, along with the intentions of the domestic cultural industry, there is a sequence of events that has affected amendments to the law in a form where it cannot be said that they are unrelated to the intentions expressed by the US government. The intention of the US government mentioned here is the "Annual Reform Recommendations from the Government of the United States to the Government of Japan under the U.S.-Japan Regulatory Reform and Competition Policy Initiative" (hereafter, ARR).

The ARR was decided in talks between then Prime Minister Kiichi Miyazawa and President Bill Clinton in 1993. With the demands of both the Japanese and U.S. governments having been communicated to the other party, the demanding papers were exchanged yearly around October, and reports of the results of the investigation into those demanding papers were sent to the heads of both countries around June of the following year.

Several events were demanded by the ARR that were symbolic for Japanese soci-

ety in the era of the Lost 20 Years, such as the privatization of Japan Post or the liberalization of temporary staffing. There is also the viewpoint that the future of Japan was written in the ARR. The exchange of demanding papers began in 1994 and continued until 2008 when the Hatoyama Administration abolished it. In 2011, however, the same type of dialog was revived under the name of the United States-Japan Economic Harmonization Initiative (EHI).

Regarding the directionality of the Japanese Copyright Act, there are several points that are referenced in the ARR, and there are even parts that are seen to be amendments of the law that satisfy U.S. demands. This paper investigates several separate issues with regard to what the actual circumstances were in concrete terms.

However, before that, let us first clarify the typical procedure for the amendment of the Japanese Copyright Act. It is the Copyright Division of the Agency for Cultural Affairs that has jurisdiction over the Copyright Act. The Copyright Subcommittee of the Culture Council, which has been established in the Agency for Cultural Affairs, conducts investigations directed at the revision of the law. Every year, the Copyright Subcommittee sets the items that must be intensively deliberated, and between one and two years are taken in the subcommission to investigate those items and summarize the findings in a written report. The written report is approved by the subcommittee, summarized in a concrete bill in the Agency for Cultural Affairs, and placed on the Diet's agenda after a decision in a Cabinet meeting. Thus, once it is passed by both houses of the Diet, the amendment of the law is implemented. A bill placed on the agenda of the Diet through the decision of a Cabinet meeting just like this example is called a "Cabinet Law." Being placed on the agenda of the Diet as Cabinet Law is a typical method, but an agreement may not be reached if there is an inquiry commission that stands in opposition to any interests. Additionally, since several years are required for the series of processes, rushed revisions to the law cannot be handled.

Other than becoming a Cabinet Law after discussion by an inquiry commission, an amendment proposal may be placed on the Diet's agenda with a private member's bill from a Diet member. Contrary to rapid revisions to the law being possible, the part of this law that has not been carefully deliberated by specialists poses the danger of becoming a problematic amendment. Additionally, through industry groups' lobbying of politicians, there is a problem that amendments to the law or the enactments of new laws that take away users' convenience may end up being placed with a private member's bill.

4 . Individual Issues Concerning Copyright

4. 1 The Problem of Extending the Copyright Protection Period

Hereafter, we will examine concrete examples in the movements of the domestic content industry, the ARR, the discussion by the inquiry commission, and the responses of users with respect to these. First is the problem of extending the copyright protection period.

In Japan, until 2002, in the case of a general work, copyright protection was given for 50 years from the death of the author, while in the case of anonymous/aliased/corporate works, copyright protection was given for 50 years from the official release. According to the Sonny Bono Copyright Term Extension Act enacted in 1998 in the U.S., the period of protection for the corporate copyright of works released up to 1977 was extended from 75 years to 95 years after publication, and with regard to works announced in 1978 and thereafter, with general works, the copyright protection is 70 years from the death of the author, while in the case of corporate works, the copyright protection is the shorter of either 95 years from publication or 120 years from production. The U.S. intended to make such a long protection period, seen globally as a long protection period, a global standard, and the U.S. has continued to apply pressure on all countries to that end.

Also in Japan, copyright holders have principally advocated that a long protection period will further stimulate cultural activities. The 1999 Agency for Cultural Affairs copyright inquiry commission discussed the possibility of extending the protection period but did not conclude that it should be immediately extended. In 2002, in the Culture Council, the Motion Picture Producers Association of Japan advocated making the protection period after release 70 years for movies only.

Beginning with the ARR of that year, a demand was described where the copyright protection period for general works must be extended to 70 years after the death of the author, while the copyright protection period for corporate works must be extended to 95 years after the official release. The movements of the ARR and the Motion Picture Producers Association of Japan are almost concurrent, and some kind of connection between the two parties had been presumed. The encouragement by the Motion Picture Producers Association of Japan was successful, and an amendment to the law was passed in 2003 that made the protection period 70 years after release. The following description was seen in the ARR written report exchanged in 2003. It has a style of writing that seems to promise the U.S. an extension of the protection period even with regard to works other than movies.

> The Government of Japan submitted a bill amending the Copyright Law to the Diet on May 13, 2003 in order to extend the term of protection for cinematographic works from 50 years to 70 years from their first publication. The Government of Japan will continue its deliberations on extending the terms of protection for other subject matter protected under the Copyright Law, in consideration of several factors including global trends.

In the 2003 Culture Council Copyright Subcommittee, a group of copyright holders advocated for making the protection period 70 years even with regard to general works. In the 2004 version of the "Intellectual Property Promotion Program" announced every year by the Intellectual Property Strategy Headquarters that has been established in the office of the Prime Minister, a revision to the law where necessary would be included with regard to the protection period of general works, and an extension has effectively entered a predetermined track. Even in the ARR, the extension of the protection period was continuously described until 2007.

In 2006, the Japan Writers' Association and 16 other groups called for an extension of the protection period. On the other hand, extending the protection period would not only discourage new creativity but also make it remarkably difficult to utilize past works, and this concern about stagnating culture spread among users. People who were aware of the problem gathered together, and in 2006, the National Council to think about the problem of extending the copyright protection period was launched, an open forum has been held repeatedly, and the discussion has deepened.

In 2007, a sub-commission to consider the problem was established in the Culture Council. The documents, which the Agency for Cultural Affairs prepared at Assembly No. 1 of this sub-commission, specified demand from the U.S. in the ARR as one of the underlying reasons for the necessity of extending the protection period. On the other hand, considering that concern for the extension of the protection period was spreading among the public, the Agency for Cultural Affairs altered the sub-commission configuration that was biased toward copyright holders and incorporated numerous opinions in the discussion. The written report compiled in 2009 stated, "It is appropriate to continue the deliberation so that a conclusion can be obtained that harmonizes the balance of protection and utilization," and the extension of the protection period that was effectively on a predetermined track was overturned by the power of the public. This was an extremely rare conclusion made in the history of copyright in Japan.

The ARR demanded that the extension of the protection period continue until 2007; however, it accepted the trend as described above, and the 2008 demanding

paper did not include this. The ARR itself was abolished soon thereafter, and the EHI, which was a revived ARR in 2011 in the U.S. once again, demanded an extension of the protection period. The inheritance of that policy by the TPP will be discussed later.

4. 2 Law for the Prevention of Surreptitious Videoing

In the middle of the discussion on the extension of the copyright protection period in 2006, in the Intellectual Property Strategy Investigating Committee of the Liberal Democratic Party, the chairperson of the Japan Video Software Association, Tsuguhiko Kadokawa sought legislation to prohibit the "surreptitious videotaping" of movies in a theater. The act of recording movies for the purpose of private use in the movie theater had been legal under the Copyright Act. Movies "surreptitiously shot" appear on the market as pirated editions. The association had the intention of demanding some kind of restriction on that act. Suddenly, a demand for measures to counter movie piracy appeared in the 2006 version of the ARR document that was officially released three months after that: "Enacting effective anti-camcording legislation against the use of recording devices in movie theatres, aimed at cutting off the major source for masters used to make pirate DVDs." Technically, the movements of the domestic industry were in a manner that somewhat preceded the AAR, but it can be inferred that the two parties were moving in coordination.

In order to implement this legislation, upon agreement by the inquiry commission, the proposal for the amendment of the Reproduction for Private Use provision of Article 30 of the Copyright Act was supposed to be brought before the Diet as a Cabinet Law by the normal method. However, at this time, the Law Relating to the Prevention of Surreptitious Videotaping (Surreptitious Movie Videotaping Prevention Act) that overwrote the Copyright Act was drafted separately, and the industry and the Liberal Democratic Party adopted a way to place it on the agenda of the Diet as a private member's bill without submitting it to the inquiry commission. It took three weeks from being placed on the agenda of the Diet to be executed, and during that time, there were only a few people who noticed these movements. In the ARR's written report issued the following year, the results of the U.S. demands were described as follows: "A bill which makes it possible to punish those who make sound or visual recordings of movies in movie theaters, even if the recordings are for the purpose of private use, by applying the penalty provision of the Copyright Law, passed the Diet on May 23, 2007." The Law Relating to the Prevention of Surreptitious Videotaping was enacted on August 30, 2007, and since that day, a PR short movie calling for the prohibition of surreptitious videotaping has been distributed in Japanese movie the-

aters. In the movie, a man with a video camera for a head performs a pantomime.

In the content of the Surreptitious Movie Videotaping Prevention Law, it is thought that there are not many problems on a serious level. However, copyright law amendments should have been originally desired through discussions in which specialists are involved. Separate from a law that overwrites the Copyright Act with a private member's bill through the lobbying of an industry group, there should be room for discussion of whether the method that executes that law rapidly is appropriate. This is because the success model for the private member's bill at this time was once again tested at the time of the "Illegal Download Penalization" discussed below.

4. 3 Illegal Download Penalization

The demand to revise the scope of Reproduction for Private Use in Article 30 of the Copyright Act can be seen in the ARR report of 2000. The relevant description was unseen from 2001 to 2003, but it was revived in 2004. Thereafter, in the Culture Council Copyright Subcommittee that was formed in 2006, the music/film industry made a strong demand that the act of knowingly downloading music and movies that had been illegally uploaded be excluded from the definition of "reproduction for private utilization." In concert with those trends, the relevant parts of the 2007 ARR were as follows.

> Ensure the transparency of relevant rules and regulations so that right holders are not adversely affected and competition law, and protection of trade secrets are considered, including by limiting the private copy exception to copies made from a legal source and not extending this exception to activities with implications outside the home (such as downloading copies from peer-to-peer services).

In the sub-commission, at the end of an intense discussion with members representing users, the Copyright Act was amended on the premise of not applying criminal punishments, and it was agreed to criminalize illegal downloads in 2008.[3] The ARR document of October 2008 that preceded the final agreement included a description "clarifying that the private use exceptions in Japan's Copyright Law does not apply to the downloading of content from unlawful sources." It is understood that the U.S. pressurized Japan so that the criminalization of illegal downloads was surely implemented.

The amended Copyright Act that criminalized illegal downloads was enacted in

3 A detailed description of the progress of this subcommission is given in chapter 4 of Yamada Shōji, *Nihon no chosakuken wa naze konnani kibishiinoka* (Kyoto: Jimbun Shoin, 2011).

January 2010. As stated previously, the object of this amendment was limited to music and movies, and copyright holders did not advocate for the necessity of applying criminal punishment. However, in the EHI of 2011, the U.S. demanded that the scope of application of illegal downloads be widened, stating the aim to "targeting all works, clarify that the exceptional provision relating to private use in the Japanese Copyright Act is not applicable to downloads from illegal information sources."

In the summer of 2011, the Recording Industry Association of Japan began lobbying Diet members using a popular actor and began activities for the penalization of illegal downloads. A private member's bill, such as the Surreptitious Movie Videotaping Prevention Law, had been planned once. However, it fell through and was finally subject to revisions through a Diet member proposal for the 2012 Copyright Act amendment that had been originally planned as a Cabinet Law. The industry succeeded in causing the criminal punishment of illegal downloads to pass in the Diet. At this time, a fierce opposition movement occurred, centered around Internet users, but in the end, it was unable to move the Diet.

With this, for the act of downloading works that have been illegally uploaded, an act that any Internet user can perform, a criminal punishment may be imposed of "up to two（2）years imprisonment or up to 2,000,000 JPY fine, or both." The amendment destroyed the balance between the protection and utilization of a work, and even influential legal experts who had approved of the criminalization of illegal downloads declared their opposition to it. However, the fact that these kinds of techniques went unchallenged is assumed to create a large breeding ground for future troubles, including the outcome of the TPP hereafter.

5. Concern for the TPP

The current topics that have critically impacted amendments to the Japanese Copyright Act hereafter are those related to the TPP negotiations. The negotiations themselves were conducted in strict secrecy, and in Japan, even Diet members could not see the text of the negotiations.[4] Even in the U.S. there have been voices critical of the fact that the negotiation techniques are not democratic. According to the agreed text, for Japan, the extension of the copyright protection period, the removal of the offense subject to prosecution only on complaint for copyright infringement offenses, and the introduction of pre-established and additional damages have been largely agreed.

4 The present situation of the TPP at the time of the writing of this paper in January 2016.

The truth is that while these items have all continued to be demanded by the U.S. in the ARR as well as in the EHI, it is not necessary to immediately revise the law as a result of the deliberation by a domestic inquiry commission, or the introduction of those systems have already been concluded to be negatives. As this kind of "policy laundering" is a non-democratic technique and attempts were being made to conduct it conspicuously, it was a major problem for handling copyright with the TPP.

In Japan, which does not have a legal principle of fair use like in the U.S. it is inevitable that either the extension of the copyright protection period, the removal of offenses subject to prosecution only on complaint, or pre-established/additional damages will largely impact the reuse of classical works from the past, archiving, and the existence of secondary uses with UGC. In particular, with the Japanese UGC culture such as the comic market that supports the world of manga/anime that is highly popular worldwide, there is the possibility of inviting a critical situation through the TPP. Thus, legislation to avert such a situation is needed.

As described above, it can be forecast that the confrontation between U.S. or industry interest and user demand that began with the Lost 20 Years will continue, and when the design of a system is mistaken, it may be linked to the withering of Japanese popular culture.